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No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether injunctions to require immediate cessation of discharges in violation of the Clean Water Act are mandatory under the standards articulated in *TVA* v. *Hill*, 437 U.S. 153 (1978), and not subject to the equitable discretion of the district court.*

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* In addition to the Secretary of Defense, the defendants below included the Secretary of the Navy, the Chief of Naval Operations, the Commander in Chief of the Atlantic Fleet, the Commandant of the Marine Corps, the Caribbean Commander of the Atlantic Fleet, the Commandant of the Coast Guard, and "unnamed John Doe Defendants." In addition to Carlos Romero-Barcelo, the Governor of the Commonwealth of Puerto Rico, the original plaintiffs below included the Mayor of Vieques, the Commonwealth Environmental Quality Board, Misíon Industrial de Puerto Rico, Inc., and individual fishermen/residents of Vieques: Luis Medina, Jésus Medina, Mario Antolino Felix, Cristóbal Medina, Severino Ventura Cintrón, Héctor Medina, Cristóbal Medina, Jr., Enrique García, Antonio Ayala González, Angel Ventura and Daniel Medina. Plaintiffs-intervenors included: Carlos A. Zenón, Mario Félix Mariano Rivera Guishard, Alicio Ayala Sota, Francisco Medina Meléndez, Esmeraldo Meléndez and Santos Ríos, fishermen who are residents of Vieques, the "Asociación de Pescadores de Vieques, Inc.," a cooperative of Vieques fishermen, and "Fundación Arqueológica, Antropologica e Historica de Puerto Rico," a non-profit corporation involved in research and preservation of historical and prehistorical cultural resources (Pet. App. 53a-54a).

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 643 F.2d 835. The opinion of the district court (Pet. App. 53a-168a) is reported at 478 F. Supp. 646.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. 169a-170a). A timely petition for rehearing was denied on February 27, 1981 (Pet. App. 52a). The petition for a writ of certiorari was filed on May 26, 1981, and granted on October 5, 1981 (J.A. 186). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. III) 1251 *et seq.*, are reprinted in Pet. App. 171a-180a.

STATEMENT

This case concerns the Navy's use of part of Vieques Island, Puerto Rico, as a range for air-to-ground, naval gunfire, and amphibious weapons training. The island, located off the southeast coast of Puerto Rico, is approximately 20 miles long and has an average width of 4 miles. It consists of approximately 33,000 acres, of which the United States owns more than 25,000 acres. For many years, the Department of the Navy has used a small portion of the eastern end of the island for weapons training. The remaining Navy-held land is used primarily as a buffer zone. (See Pet. App. 57a, 61a, 63a, 167a-168a.)

The weapons training areas on Vieques are part of a larger complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. This complex consists of four ranges: (1) the outer range, a large area of ocean lying to the north and south of Vieques,[1] (2) the underwater range, located off the western shore of St. Croix, (3) the electronic warfare range consisting of a series of facilities located on Puerto Rico, Vieques and other neighboring islands,[2]

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[1] At its closest points, the outer range is 35 miles north of Vieques, and 20 miles to the south.

[2] These facilities, referred to as "threat platform" simulators, are designed to "provide a realistic electronic environment for the training of shipboard electronic warfare teams

and (4) the inner range consisting of the targets on Vieques. Because of the existence of all these facilities in the area, naval vessels and crews have the unique opportunity to conduct exercises on several of the ranges under conditions that simulate, as far as possible, actual combat. Accordingly, all Atlantic Fleet vessels assigned to the Mediterranean and the Indian Ocean must successfully complete their training at Vieques to meet operational qualifications standards. Cessation or interruption of Navy activity on Vieques would cripple the service's ability to perform tasks assigned to it by the National Security Council. (See Pet. App. 163a-165a.)

The targets on Vieques consist of artillery targets, two bull's-eye targets for inert air-to-ground bombing practice, strafing targets, a series of mock targets of opportunity (*e.g.*, mock surface-to-air missile sites, fuel farm, ammunition dump and airstrip) for live air-to-ground bombing practice, and two remote controlled moving targets. There are also six naval gunfire targets. (Pet. App. 7a.) These targets are all in the eastern portion of the island. The artillery targets, the bull's-eye inert bombing targets, and the strafing targets are located in an area known as the Surface Impact Area (SIA). The western boundary of the SIA is nine kilometers from the closest portion of the civilian occupied area of Vieques. (*Id.* at 6a-7a.) The remaining targets are located to the east of the SIA, in an area known as the Air Impact Area or Close Air Support Zone (AIA/CAS). The closest point of the civilian zone is about 13 kilometers from

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and tactical electronic order-of-battle, in support of exercises and operations conducted on the various other ranges" (Pet. App. 62a-63a; 478 F. Supp. at 655).

the border of AIA/CAS. The area between the civilian zone and the SIA is occasionally used for amphibious landing exercises; it is also leased to the local cattle association for grazing purposes. *Ibid.*

Air and sea operations in the inner range occur about 200 days a year, between the hours of 7:30 a.m. and 10:00 p.m. Aircraft training on the range are forbidden to fly over civilian areas, and ordinarily come no closer to such areas than five miles. Vessels shooting at targets in the AIA/CAS are positioned three to eleven miles south of the island. A danger zone in the sea surrounding Vieques, which prohibits civilian navigation in the area, is activated when the range is in use. (Pet. App. 7a.)

2. On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit seeking to enjoin continued use of the island for weapons training. The complaint (J.A. 3-54) charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress in the last decade, including the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; the Clean Air Act Amendments of 1970, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; the Endangered Species Act of 1973, 16 U.S.C. (& Supp. III) 1531 *et seq.*; the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (and Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), which implements that Act); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, and the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*

In addition, the complaint claims violations of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 401 *et seq.*, various amendments to the United States Constitution, and congressional and presidential directives concerning cessation of Navy operations on the neighboring island of Culebra. (See Pet. App. 55a-56a.)[3]

The district court held an extensive hearing on the merits of these allegations. The hearing on motions for a preliminary injunction, later consolidated as a hearing on the merits, lasted approximately 50 days and included testimony by dozens of lay and expert witnesses. The district court also made two site visits to Vieques to inspect the inner range and the surrounding waters (Pet. App. 56a-57a).

On September 17, 1979, the district court filed a comprehensive decision and order (Pet. App. 53a-168a). It found the Navy in violation of NEPA for failure to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement (*id.* at 155a-159a). It held the Navy to be in violation of the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*, for occasionally and inadvertently discharging ordnance into coastal waters without a National Pollutant Discharge Elimination System (NPDES) permit (Pet. App. 79a-81a).[4] It also found the Navy had failed to comply fully with Exec. Order No. 11593, *supra*, as it had not nomi-

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[3] As the district court remarked, the suit presented "an all-inclusive challenge to Defendant Navy's presence and activities in Vieques" (Pet. App. 57a).

[4] These deposits occur during naval gunfire and air to ground training when the land-based targets are missed, and the ammunition hits the water instead.

nated historic sites to the National Register (Pet. App. 134a-138a). It ordered the Navy to file for an NPDES permit, to nominate historic sites to the National Register and to comply with the provisions of NEPA (*id.* at 165a).[5]

Despite the "technical" violation of the Clean Water Act (Pet. App. 162a),[6] the district court found that "no credible evidence was presented

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[5] The Navy prepared an environmental impact statement; in January 1981, the Secretary of the Navy reviewed the statement and made a formal decision to continue using the weapons training facilities located on Vieques. 46 Fed. Reg. 12773 (1981). The Navy also submitted 34 historic sites to the Keeper of the National Register and requested his opinion on their eligibility to be placed on the register.

Also, on December 28, 1979, the Department of the Navy filed an application for an NPDES permit with the Environmental Protection Agency. On May 29, 1981, the EPA issued a draft NPDES permit and a notice of intent to issue that permit. Section 401(a) of the Clean Water Act, 33 U.S.C. (Supp. III) 1341(a), requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. The Respondents herein received an extension of time, to and including December 20, 1981, in which to determine whether a state certification will be issued, and issued a notice of "Intention to Deny Water Quality Certificate" (June 25, 1981) (Reply Mem. App.).

[6] The Clean Water Act defines pollutant to include "munitions" Section 502(6), 33 U.S.C. 1362(6). A "point source" means "any discernable, confined and discrete conveyance, including but not limited to any * * * vessel * * * from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. (Supp. III) 1362(14). Under these definitions, shells and bombs released from naval ships and aircraft can be deemed pollutants discharged from point sources. The firing of ordnance into waters outside the territorial sea (three miles), however, is not subject to the Clean Water Act. See Section 502(12), 33 U.S.C. 1362(12).

* * * [to show] that any of the materials deposited in the waters surrounding Vieques * * * has had any measurable deleterious effects on the environment, or on the quality of the surrounding waters, from a scientific vis-a-vis legal standpoint" (Pet. App. 80a; 478 F. Supp. at 648). This general finding was supported by numerous specific factual findings detailing the exceptional health of the marine environment (*e.g.*, Pet. App. 86a, 115a-133a). In sum, the court concluded (Pet. App. 115a (footnote omitted)):

> Although the nature of Defendant Navy's activities have a tendency towards provoking dramatic conclusions, a dispassionate analysis of the scientific evidence leads us to the conclusion that the negative impact of the Defendant Navy's activities on the coastal zone of Vieques is negligible, and if the truth be said, the control of large areas of Vieques probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur*.

Based on these findings, the district court concluded that injunctive relief was not appropriate in this case, because "the activities of the Defendant Navy are not causing any appreciable harm to the Vieques ecology. * * * Nor is there any logical connection between [the rectification of the technical violations] * * * and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate" (Pet. App. 162a). Moreover, the court noted that there was "not the slightest doubt but that the

granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation" (*id.* at 163a), because of the effects on the national security of the loss of the use of the unique training facilities at Vieques.

On appeal,[7] the court of appeals affirmed the district court on most issues.[8] It did not reevaluate the district court's findings concerning the ecological health of the Vieques waters, and indeed agreed that "on this record the district court did not clearly err in its finding" that the dropping of ordnance caused no significant harm to the environment (Pet. App. 49a).[9] But the court held that the district court had

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[7] Because the literal language of the definitions of the Clean Water Act covers inadvertent release of shells and bombs into the coastal waters off Vieques, and the Environmental Protection Agency was willing to develop an appropriate NPDES permit, the petitioners did not appeal the district court ruling that the Clean Water Act was violated.

[8] In addition to the Clean Water Act issue presented here, the court of appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the district court for further consideration (Pet. App. 51a).

[9] The court of appeals did not consider the district court's detailed findings concerning the general health of the marine environment. Those findings were made in connection with the district court's rejection of respondents' claims under the Endangered Species Act; the court of appeals remanded those claims to the district court for reconsideration in light of a "biological opinion" submitted to the Navy after the district court's judgment (Pet. App. 39a-40a). Although that opinion supported the district court's findings (Pet. App. 41a), the court of appeals concluded that the remand was necessary to permit the district court to consider "evidence that both this court, and Congress, deem essential to a complete decision of the issue" (*ibid.*).

used the wrong standard in denying an injunction under the Clean Water Act. Relying on this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), the court held that the Navy's violation of the statutory mandate ipso facto required the issuance of an injunction; the equitable balancing of competing interests was precluded once the statutory violation was found (Pet. App. 48a-49a).[10] Accordingly, it vacated the remedy devised by the district court and remanded with directions to enter an injunction against the further inadvertent deposit of munitions in the Vieques water without a NPDES permit (Pet. App. 49a).[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals should have looked to *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), rather than *TVA* v. *Hill*, *supra*, for the analysis that controls this case. In *Hecht Co.* v. *Bowles*, the administrator of the Emergency Price Control Act of 1942 sought an injunction under a statutory provision directing that "upon a showing * * * that [any] person has engaged * * * in [the prohibited] practices a temporary or permanent injunction, restraining order, or other order shall be granted" (321 U.S. at 327). Although defendant Hecht Co. admitted the violations

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[10] The court of appeals dismissed the national security interests at stake with the remark that "[i]f this order significantly interferes with the Navy's preparedness it is free to request the President to exempt it from the NPDES requirement in the interest of national security. *See* 33 U.S.C. Sec. 1323(a)" (Pet. App. 49a).

[11] On Mar. 6, 1981, the mandate of the court of appeals was stayed pending the disposition of our petition for certiorari.

charged, the district court refused to enter the immediate cessation order requested. The court of appeals reversed, believing (as did the court of appeals here), the governing statute to "require the issuance of [such an] order as a matter of course, once violations were found." 321 U.S. at 326. This Court rejected that rigid interpretation of the statutory language, finding in the legislative history and the statutory purpose of the Price Control Act (as we urge with respect to the Clean Water Act) no indication of any intent to require such a significant departure from the traditions of equity practice (321 U.S. at 329-330).

The statutory purposes do control the Court's equitable discretion. The exercise of the traditional power of equity must be "conditioned by the necessities of the public interest which Congress has sought to protect" (*id.* at 330). The court's discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, * * * measure the propriety and need for injunctive relief in these cases." *Id.* at 331. Thus, in determining the nature of injunctive relief appropriate to remedy a violation of a statute, a particularized analysis of the statutory language, policies and purposes, as well as the facts and circumstances of the violation, is necessary. See *State of Alaska* v. *Andrus*, 580 F. 2d 465, 485 (D.C. Cir.), vacated in part *sub nom. Western Oil & Gas Association* v. *Alaska*, 431 U.S. 922 (1978).

The district court here made just such an analysis, and concluded that (Pet. App. 162a):

> The violations which we have found, are in substance technical violations, which must be cured, but do not require the drastic treatment sug-

would seem to be foreclosed by Hecht Co. v. Bowles

> gested by Plaintiffs. Furthermore, there does not appear any reason why their rectification can not be accomplished in a relatively short period of time. Nor is there any logical connection between the accomplishment of this purpose and ordering a halt to the activities of Defendant Navy, other than as punishment, a purpose for which injunctive relief is not appropriate. See *Hecht Co.* v. *Bowles, supra.*

The court of appeals did not consider whether the district court's balancing of the equities gave sufficient weight to the statutory purposes of the Clean Water Act. Instead, it concluded that the bare fact that the Act had been violated required the issuance of an immediate cessation order—a "position which [*supra*]." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975).[12]

TVA v. *Hill* did not cast doubt on the holding of *Hecht Co.* v. *Bowles.*[13] Indeed, the Court in *TVA* v. *Hill* followed the approach utilized in *Hecht Co.* v. *Bowles*, referring expressly to that case, and the district court's no benefit finding therein (437 U.S. at 193-194). The different result in *TVA* v. *Hill* was due to the specific characteristics of the statute and the factual situation there before the Court. Those special circumstances are not present here.

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[12] It is not entirely clear whether respondents support this conclusion of the court of appeals, or argue only that the result reached was correct in light of their view of the balance of the equities (compare Resp. Br. in Opp. 10-11 & 8-9, 12, 15).

[13] This court has relied on that decision in cases subsequent to *TVA* v. *Hill*, *Califano* v. *Yamasaki*, 442 U.S. 682, 694 n. 9 (1979); *Aaron* v. *SEC*, 446 U.S. 680, 701 (1980).

Cong., 1st Sess. 6 (1973). Closing the gates of the Tellico Dam, and destruction of the snail darter, would have been directly and fundamentally in conflict with the purposes of the Act.

Neither of these two factors has any parallel in this case. The language, structure, legislative history and consistent administrative interpretation of the Clean Water Act all point to the existence of judicial discretion to fashion whatever relief is appropriate (including, but not limited to, immediate cessation orders) to secure prompt compliance with the purposes of the Act. The district court found that the waters surrounding Vieques are in excellent condition and the court of appeals did not disagree. The district court also found that the immediate cessation of the target practice would severely impede the Navy's accomplishment of its national security responsibilities.[14] In light of those findings, the district court correctly exercised its discretion, consistent with the policies and purposes of the Clean Water Act, in refusing to enjoin continuation of the target practice pending issuance of a NPDES permit.

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[14] The court of appeals also recognized that cessation of use of the range might interfere with military preparedness, but suggested that enjoining the Navy from missing the targets would not interfere with its training activities (Pet. App. 49a n.55), and that, if it did, the Navy could get a presidential exemption from the Clean Water Act (Pet. App. 49a). Respondents make a similar suggestion (Resp. Br. in Opp. 8). An exemption would not, of course, be as consistent with the purposes of the Clean Water Act as the course chosen by the district court, which contemplates the prompt compliance by the Navy with the Act.

I. THE CLEAN WATER ACT DOES NOT INCLUDE A CONGRESSIONAL JUDGMENT OVERRIDING ALL EQUITABLE DISCRETION; INSTEAD FLEXIBILITY OF ENFORCEMENT REMEDY IS NECESSARY

A. Unlike Section 7 of the Endangered Species Act, the Clean Water Act does not contain any explicit congressional statement subordinating other federal interests to the preservation of water purity. In contrast to the flat ban, without exception when *TVA* v. *Hill* was decided, on the destruction of critical habitats in Section 7, the prohibition in Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), can be overcome by the grant of a permit (Section 313(a), 33 U.S.C. (Supp. III) 1323(a)). And Section 313(a), 33 U.S.C. (Supp. III) 1323(a) imposes a duty on federal agencies to comply with water pollution abatement requirements "in the same manner, and to the same extent as any nongovernment entity * * *." Neither Section 301(a) nor Section 313(a) imposes any duty on federal agencies or restrictions on federal actions that do not apply equally to all other dischargers of pollutants.[15] Thus, unless the restrictions of Section 301(a) are deemed to override every competing interest held by anyone in the Nation, the Clean Water Act does not contain an "ordering of priorities" which the Courts are powerless to alter.

The Act cannot reasonably be read as imposing such overriding restrictions. To be sure, Congress expected the Clean Water Act to be vigorously enforced and contemplated immediate cessation orders

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[15] To the contrary, Congress provided a limited form of relief for federal agencies through the exemption procedure. See note 30, *infra*.

if appropriate to the circumstances. But there is nothing in the Act or its history to suggest that Congress intended to eliminate the traditional discretion of the courts in enforcing the statutory requirements. Cf. *TVA* v. *Hill*, *supra*, 437 U.S. at 193-194. There is instead strong evidence that Congress contemplated that the federal courts would exercise their equitable discretion in fashioning "appropriate relief, including a permanent or temporary injunction" against violations of the Act (Section 309(b), 33 U.S.C. 1319(b)).

1. The entire structure of the Clean Water Act confirms the need for flexibility in developing "appropriate" enforcement mechanisms.[16] The Act sets out a complicated and phased system of pollution abatement punctuated with statutory deadlines. As this Court has held, some of the statutory standards are absolute. See *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980). Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). As a result, remedial flexibility will sometimes be needed to avoid the unnecessary hardship that the automatic application of the requirement to extreme factual circumstances might produce.

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[16] Congress did specify certain circumstances when discharges of pollutants were to be immediately enjoined. In Section 504(a), 33 U.S.C. (Supp. III) 1364(a), it authorized the Administrator of the Environmental Protection Agency to bring suit "to immediately restrain" discharges of pollutants that he finds to be causing or contributing to "an imminent and substantial endangerment of the health of persons or to the welfare of persons * * *." This provision is the only Section of the Clean Water Act that approaches the congressional ordering of priorities this Court found in Section 7 of the Endangered Species Act. It also is strong evidence that Congress did not expect that a rule of automatic, immediate cessation would be applied to all violations of the Act.

2. Nothing in the legislative history of the Act suggests that Congress intended that the only proper judicial response to a violation of the Act would be an immediate cessation order. The Senate Report reveals that "[i]n writing the enforcement procedures involving the Federal Government the Committee drew extensively * * * upon the existing enforcement provisions of the Rivers and Harbors Appropriation Act of 1899 (Refuse Act) [33 U.S.C. 401]". S. Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1481 (1973) ("*Legislative History*"). See also *Legislative History* 1306. Injunctions requiring immediate cessation of discharges in violation of the Act have not been automatic under the Refuse Act. See, *e.g.*, *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 535-537 (8th Cir. 1975); *United States* v. *Rohm & Haas Co.*, 500 F.2d 167, 195 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States* v. *Kennebec Log Driving Co.*, 491 F.2d 562, 571 (1st Cir. 1973), on remand, 399 F. Supp. 754, 759 (D. Me. 1975). Instead courts have carefully fashioned appropriate relief to vindicate the purposes of the statute with due regard to the surrounding facts and circumstances. There is no indication that at the time Congress acted it anticipated any different result. Cf. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960), noting that in the Rivers and Harbors Act—of which the Refuse Act is a part—"Congress has provided enough federal law * * * from which appropriate remedies may be fashioned * * *."

3. Finally, consistent agency practice assumes the existence of the power to provide appropriate relief short of immediate cessation orders. Indeed, enforce-

ment against violators of the Clean Water Act has not been characterized by requests for, or entry of, immediate cessation orders. Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act. See, *e.g.*, *City of Milwaukee* v. *Illinois*, No. 79-408 (Apr. 28, 1981), slip op. 4-5, 15-16. Congress, moreover, has been fully aware of these enforcement procedures.[17]

B. Unlike the circumstances of *TVA* v. *Hill*, *supra*, an order requiring the immediate cessation of the violating activity is rarely the sole remedy available to vindicate the purposes of the Clean Water Act. While an equitable order is appropriate to remedy violations of the Act, immediate cessation of the violating discharges is not always necessary. Instead, courts must fashion "appropriate" relief (33 U.S.C. 1319(b)): relief that adequately vindicates the purposes and policies of the Clean Water Act with due regard to equitable principles. See generally *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 456-457 (D.C. Cir. 1977); *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 329-330; *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360-361 (1933); *State of Alaska* v. *Andrus*, *supra*, 580 F.2d at 485.

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[17] The statute apparently contemplates the development of such carefully tailored remedial orders, because it affords interested citizens the opportunity to participate in the formulation of these decrees through intervention (Section 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). Department of Justice regulations further provide for a public comment period (28 C.F.R. 50.07). This public participation in the formulation of the decree would, of course, be pointless if every violation of the Act were to be remedied by an immediate cessation order.

7 *Moore's Federal Practice* ¶ 65.18[3], at 65-133 to 65-140.1 (2d ed. 1980). Thus, in most cases, an "appropriate" injunctive remedy is one designed to bring the violator into compliance with the requirements of the Clean Water Act as expeditiously as practicable rather than to require immediate cessation of the discharge.[18] To be sure, immediate cessation is an appropriate remedy in some cases, *e.g.*, where compliance is impossible or the public interest demands it.

More generally, an appropriate remedy must further the fundamental purposes of the Act. The overall purpose of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" (Section 101(a), 33 U.S.C. (& Supp. III) 1251(a)).[19] To that end,

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[18] In their opposition to the petition for a writ of certiorari, respondents argue that an immediate cessation order was appropriate in this case because of the Navy's "utter disregard" of the statutory requirement (Resp. Br. in Opp. 8-9, 15). While we disagree with that characterization of the Navy's conduct (see *infra*, pages 23-24), we also submit that respondent's view that the appropriateness of the remedy turns primarily on the culpability of the violator ignores the remedial purpose of the injunctive remedy. As this Court emphasized in *Hecht* v. *Bowles*, *supra*, 321 U.S. at 329, "[t]he historic injunctive process was designed to deter, not to punish".

[19] The word integrity "refers to a condition in which the natural structure and function of ecosystems is maintained" (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972), *reprinted in Legislative History* 763). An ecosystem whose structure and function is "natural" is "one whose systems are capable of preserving themselves at levels believed to have existed before irreversible perturbations caused by man's activities" (H.R. Rep. No. 92-911, *supra*, at 77, *reprinted in Legislative History* 764).

Congress insisted on uniform treatment for classes and categories of dischargers throughout the Nation (see *Legislative History* 162, 356, 452-453, 473-475, 706-707, 710-711; *E.I. Dupont de Nemours & Co.* v. *Train*, 430 U.S. 112, 129-130 (1977)), so as to prevent states from creating pollution havens to lure businesses from states responsibly acting to reduce water pollution. See *Legislative History* 473-475. Consistent with this policy of uniformity, federal effluent limitations guidelines are based upon technical feasibility rather than the effect of discharges on water quality. See *E.I. Dupont de Nemours & Co.* v. *Train*, *supra*.[20] On the other hand, Congress recognized that it was impractical to require immediate achievement of the desired levels of pollution control, and thus provided for a phased program. It is entirely consistent with this statutory scheme for the district courts to provide for some flexibility in the timing of compliance in particular cases, recognizing the practicalities of installing and operating technical equipment, as well as the nature of the violation and the public necessities—*e.g.*, health, safety and welfare—at stake.

If the EPA is a party to the civil action, either as the plaintiff in a federal enforcement action or as an intervenor in a citizen suit (see 33 U.S.C. 1365 (c)(2)), the court will have the recommendation of the Administrator as to the appropriate form of relief.[21] Ordinarily, we would expect a district court

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[20] Federal NPDES permits must also satisfy state water quality standards. Section 401(a), 33 U.S.C. 1341(a). In some cases, these standards require more stringent conditions than those indicated by national effluent limitations.

[21] In developing a remedial program, the Administrator considers such factors as the practicality of a time schedule

to defer to the EPA's judgment of an appropriate remedial order absent a finding that the EPA's request is arbitrary or capricious or ignores relevant factors. In cases such as this, where the EPA is not a party to an action and has not otherwise addressed the question of an appropriate remedy (through, for example, a compliance order (33 U.S.C. (Supp. III) 1319(a)(1)), a district court must fashion a remedy independently. The primary purpose of any order must be to bring the discharger into compliance with the Act within a reasonable time.[22] But the court should not close its eyes to appropriate equitable considerations in establishing a compliance schedule.

II. THE DISTRICT COURT PROPERLY FORMULATED A REMEDY DESIGNED TO BRING THE NAVY INTO COMPLIANCE WITH THE CLEAN WATER ACT

The district court directed the Navy to apply for an NPDES permit, but declined to enjoin the Navy activity that results in discharges pending issuance of the permit. First and foremost, the district court's remedy was designed to bring the Navy into compli-

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for compliance, good faith of the discharger, national uniformity of treatment for classes and categories of dischargers and competing interests in health, safety and welfare. And, while lack of environmental damages is not a defense to violation of the Clean Water Act, the likelihood of irreparable degradation of water quality would suggest rigorous remedial action. Cf. 40 C.F.R. 123.9(c).

[22] Remedial orders often involve a timetable for completion of treatment facilities, hiring and training of personnel and other technical issues. See, *e.g.*, *City of Milwaukee* v. *Illinois*, *supra*, slip op. 4-5, 15-16. For this reason, district courts often order the parties to negotiate a remedial program, or otherwise rely on the parties' expertise.

ance with the Clean Water Act. Second, the remedy took into account the particular equities presented: the lack of perceptible environmental damage, the countervailing interest in national security, and the past conduct of the parties.

The district court found the Navy in violation of the Clean Water Act because it had failed to obtain an NPDES permit pursuant to Sections 301(a) and 402 of the Act, 33 U.S.C. 1311(a) and 1342. There was, however, no evidence that the Navy had violated any substantive limitation or standard under the Act other than the permit requirement. The district court found, and the court of appeals affirmed, that the Navy activity complied with Puerto Rico water quality standards (Pet. App. 18a-22a, 81a-86a). The EPA has not issued effluent limitations guidelines for occasional deposits of ordnance pursuant to Sections 301(b) and 304(b), 33 U.S.C. (Supp. III) 1311(b) and 1314(b). See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 130-133 (1977). In fact, no effluent limitations guidelines have been promulgated for activities resembling depositing ordance unintentionally in coastal waters. See 40 C.F.R. Part 400 *et seq.*[23] In these circumstances, an injunction restraining the Navy activity would prohibit what the agency ad-

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[23] In a somewhat similar situation, problems associated with the deposit of shot into the water by duck hunters who miss their targets have been regulated by the Secretary of the Interior under the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* See *National Rifle Association* v. *Kleppe*, 425 F. Supp. 1101 (D.D.C. 1976), aff'd, 571 F.2d 674 (D.C. Cir. 1978). The EPA aided the Department of the Interior in developing these regulations; there was no suggestion that duck hunters need an NPDES permit to comply with the Clean Water Act.

ministering the Clean Water Act ultimately may find acceptable in issuing an NPDES permit.[24]

Beyond the public interest in bringing the Navy into compliance with the Act, the purpose and policies of the Clean Water Act do not demand more rigorous remedial action. The district court found "no credible evidence * * * that any of the [Navy activities] has had any measurable deleterious effects * * * on the quality of the surrounding waters" (Pet. App. 80a), and concluded that "the activities of defendant Navy are not causing any appreciable harm to the Vieques ecology" (Pet. App. 162a). The evidence presented at trial established that the Navy's activity on Vieques—including the occasional, inadvertent release of ordnance into the coastal waters—does not adversely modify the ability of the waters to sustain animal or plant life through turbidity, sedimentation or changes in chemical composition (Pet. App. 80a, 115a-126a). The coral reef and seagrass systems in waters surrounding the island were found to be healthy, functioning components of the marine environment. In fact, the district court reached the overall conclusion that "the [Navy's] control of large area of Vieques probably constitutes a positive factor in its overall ecology" (Pet. App. 115a). More specifically, it noted that "these waters are as aesthetically acceptable as any to be found anywhere, and [respondents'] witnesses unanimously testified as to their being the best fishing grounds in Vieques" (Pet. App. 86a)[25] Therefore, the district court found

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[24] Should the NPDES permit impose conditions or limitations that the Navy did not meet, additional remedial relief might then be appropriate. However, if those circumstances arose, we would expect the Navy to obtain an exemption. See note 30, *infra*.

[25] The court of appeals conceded that the record supports the district court's finding that the dropping of munitions

an immediate cessation order was not necessary to protect the aquatic environment.[26]

In addition, there are significant and exceptionally strong equitable considerations arguing against the imposition of a cessation order in this case. The district court properly declined to enter injunctive relief that would have a profound adverse impact on the ability of the Atlantic Fleet to satisfy its national security obligations. The Navy weapons training facilities in and around Vieques are unique in the Atlantic. They provide the Atlantic Fleet with the opportunity to train under conditions resembling actual combat. The quality of training experience offered by the Vieques facilities cannot be duplicated by use of other Navy target ranges (see pages 2-3, *supra*). Every vessel from the Atlantic Fleet assigned to active duty in the Mediterranean or the Indian Ocean must qualify its guns on the Vieques range (see Pet. App. 164a-165a).[27]

Finally, consideration of the actions of the parties does not suggest that an injunction immediately re-

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into the water caused no significant harm to the environment (Pet. App. 48a-49a).

[26] The national interest in uniformity among classes and categories of discharges is not implicated in this case because the Navy activity is unique, and there is no possibility of the Navy obtaining an advantage over its competitors by failing to comply with the Clean Water Act.

[27] The statute itself recognizes that there may be situations in which the national security precludes compliance with the Act's requirements, and provides for a presidential exemption in such situations (33 U.S.C. (Supp. III) 1323(a)). That recognition strongly suggests that national security interests are a proper factor for the court to consider in fashioning appropriate relief where ultimate compliance with the statutory standards can be achieved and the agency has elected to comply with the Act rather than to seek an exemption.

straining Navy activity on Vieques is appropriate. The Navy has, in the past, applied for and received permits under the Clean Water Act for its activities which result in discharges into waters of the United States.[28] The EPA made several inspection visits to Vieques to ascertain the Navy's compliance with various environmental laws and the Puerto Rico Environmental Quality Board, respondent herein, communicated with the EPA concerning the Navy's compliance with the Act. Neither of the agencies suggested that a NPDES permit was required for the release of ordnance that may, inadvertently, fall into the coastal waters.

Nor did the respondents notify the Navy or the EPA of their claim of violation of the Clean Water Act prior to filing this suit despite the provisions of Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365 (b)(1)(A).[29] After the district court decision, the

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[28] These include NPDES permits for its wastewater treatment facilities at Camp Garcia on Vieques and at Roosevelt Roads Naval Station on Puerto Rico. It also obtained a permit for construction of a boat ramp on Vieques pursuant to Section 404 of the Clean Water Act, 33 U.S.C. (Supp. III) 1344 and Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.

[29] Section 505(b)(1)(A), requires a sixty-day notice to the alleged violator and the EPA as a prerequisite for a citizen's suit to enforce the provisions of the Clean Water Act. See *Middlesex County Sewage Authority* v. *National Clammers Association*, No. 79-1711 (June 25, 1981), slip op. 6-7. The notice requirement was copied from the similar provision in the Clean Air Act Amendments of 1970, 42 U.S.C. (Supp. III) 7604. See *Legislative History* 820. The purpose of the notice requirement, as stated in the Clean Air Act legislative history, is to allow the administrative authorities time to act on the alleged violation. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 37 (1970), *reprinted in A Legislative History of the Clean Air Act Amendments of 1970*, 93d Cong., 2d Sess. 437 (1974). A subsequent citizen's suit is to be considered "against

Navy expeditiously filed an application for a NPDES permit with the EPA (see page 6 note 5, *supra*). The delay in issuing the permit has been due to the need for the EPA to devise ad hoc conditions for the permit pursuant to Section 402(a), 33 U.S.C. (& Supp. III) 1342(a); it is also due to Puerto Rico's reluctance to certify compliance with local water quality standards under that Section. But see Pet. App. 18a-22a; 81a-86a.

This past conduct of the parties argues forcefully against imposition of an injunction requiring immediate cessation of Navy activity. The respondents made no efforts, formal or otherwise, to notify the Navy about, or seek a cure for, what they perceived to be a violation of the Act prior to invoking the equitable powers of the courts. The Navy, however, has shown itself willing to cooperate with environmental agencies and has offered no grounds for a belief that it will fail to comply with the standards those agencies develop. In these circumstances it is not equitable for the Navy alone to bear the burden of the delay attendant upon developing and approving an NPDES permit in this case.[30]

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the background of the agency action" and such action could justify dismissal or suspension of the citizen's suit. *Ibid.*

In the present case, respondents filed suit without advance notice and then filed a supplemental complaint sixty days later to satisfy the jurisdictional requirements of Section 505, 33 U.S.C. 1365 (J.A. 71-72).

[30] The possibility of a presidential exemption pursuant to Section 313(a), 33 U.S.C. (Supp. III) 1323(a), does not alter this analysis. Section 313(a) authorizes the President to "exempt any effluent source of any department * * * in the executive branch from compliance with any * * * requirement if he determines it to be in the paramount interest of the United States to do so * * *." Exec. Order No. 12088, 43

In any event, should this Court harbor doubts as to the appropriateness of the district court's exercise of equitable discretion, the proper course would be to remand that issue to the court of appeals for consideration under the correct legal standards. In the decision below, the court of appeals did not find that the district court abused its discretion in fashioning relief, but that the lower court lacked discretion to decline to enter an injunction immediately restraining the violating activity (Pet. App. 48a-49a).[31] It is the court of appeals' erroneous application of the standards for injunctive relief derived from *TVA* v. *Hill*, *supra*, to these very different circumstances that must be reversed.

Fed. Reg. 47707, 47709 (1978), which implements the exemption authority, is designed to restrict exemptions to extraordinary circumstances. The EPA Administrator and the Director of the Office of Management and Budget are to mediate exemption requests submitted by agency heads. The federal agency is required to certify in the exemption request that it cannot meet the applicable pollution control standards. Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program.

If the possibility of an exemption alters the equitable balance so as to subject the agencies of the United States to automatic injunctions, it essentially shifts the burden of devising an equitable and practical remedial program from the courts to the Office of the President. In the absence of a clear congressional statement of intent, the courts should not abdicate their responsibility to fashion appropriate equitable relief.

[31] For this reason, respondents' apparent suggestion that the court of appeals merely applied traditional equitable principles "tempered by the obligation to carry out the statutory mandate" (Resp. Br. in Opp. 12) simply misreads the opinion below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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